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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

No. 2:03-CR-06016-EFS

[No. 4:17-CV-05092-EFS]

8 Plaintiff/Respondent,

9 ORDER DENYING MOTION

10 v.

CLERK'S OFFICE ACTION REQUIRED

11 JOSE MANUEL AGUIERRE-GANCEDA,

12 Defendant/Movant.

13 Before the Court is Defendant/Movant Jose Manuel Aguirre-  
14 Ganceda's "Memorandum of Law in Support of 28 U.S.C. § 2255, in the  
15 Alternative, Successive-in-Time Motion Pursuant to 28 U.S.C. § 2255,"  
16 ECF No. 244. Also before the Court is Mr. Aguirre-Ganceda's related  
17 Motion for Appointment of Counsel, ECF No. 243. As explained below,  
18 the Court lacks jurisdiction and therefore denies relief and dismisses  
19 Mr. Aguirre-Ganceda's successive § 2255 motion.

20 I. PROCEDURAL HISTORY AND PRIOR § 2255 MOTIONS

21 In 2004, following jury trial, Mr. Aguirre-Ganceda was convicted  
22 of conspiracy to distribute methamphetamine, distribution of  
23 methamphetamine, possession with intent to distribute methamphetamine,  
24 and endangering human life while illegally manufacturing or attempting  
25 to illegally manufacture a controlled substance. ECF No. 133. On August  
26 18, 2004, the Court sentenced Mr. Aguirre-Ganceda to the statutory

1 minimum of life imprisonment based on his four prior drug convictions.  
2 See ECF Nos. 64, 151 & 220-2. The U.S. Court of Appeals for the Ninth  
3 Circuit affirmed the verdict and sentence. ECF No. 174. On October 16,  
4 2006, the U.S. Supreme Court denied Mr. Aguierre-Ganceda's Petition for  
5 Writ of Certiorari. See ECF No. 187.

6 On January 11, 2008, Mr. Aguierre-Ganceda filed his first § 2255  
7 motion. ECF No. 180. In it, he claimed to have received ineffective  
8 assistance from defense counsel and that the sentencing enhancement  
9 under 21 U.S.C. § 851 for prior drug convictions was unconstitutional  
10 because the convictions were not found proven beyond a reasonable doubt  
11 by a jury. See ECF No. 180. The Court denied Mr. Aguierre-Ganceda's  
12 first § 2255 motion as untimely for failure to satisfy the one-year  
13 limitation period under § 2255(f), ECF No. 187, and the Ninth Circuit  
14 affirmed this Court's denial, ECF No. 203.

15 On March 2, 2015, Mr. Aguierre-Ganceda filed a motion for a  
16 sentence reduction under U.S. Sentencing Guidelines § 1B1.1(b) and  
17 Amendment 782. ECF No. 219. The Court denied his motion, however,  
18 because Amendment 782 could not alter the fact that Count 1 carried a  
19 statutory mandatory minimum sentence of life imprisonment due to his  
20 prior convictions. See ECF No. 225.

21 On July 6, 2015, Mr. Aguierre-Ganceda filed a second § 2255 motion,  
22 this time claiming that the U.S. Attorney's Office was "using 21 U.S.C.  
23 § 851 as a weapon for retaliation for exercising [the] right to proceed  
24 to trial by jury." ECF No. 236 at 6-7. The Court denied Mr. Aguierre-  
25 Ganceda's second § 2255 motion for failure to comply with § 2255(h),  
26

1 which requires certification from the Ninth Circuit prior to filing a  
2 second § 2255 motion. See ECF No. 239.

3 Mr. Aguierre-Ganceda now brings another motion pursuant to § 2255.  
4 In his current motion, Mr. Aguierre-Ganceda argues that under the  
5 categorical approach, each of his prior California state convictions  
6 cannot qualify as a "prior conviction for a felony drug offense" under  
7 21 U.S.C. § 841 because the applicable California statutes are too  
8 broad. See ECF No. 244. He also states that one of his four prior  
9 California state convictions has been vacated. See ECF No. 244 at 13.  
10 Once again, however, there is no indication that Mr. Aguirre-Ganceda  
11 obtained Ninth Circuit certification before filing the instant § 2255  
12 motion.

## 13 II. DISCUSSION

14 Section 2255(h) states,

15 A second or successive motion must be certified as provided  
16 in section 2244 by a panel of the appropriate court of appeals  
to contain--

- 17 (1) newly discovered evidence that, if proven and viewed in  
18 light of the evidence as a whole, would be sufficient to  
19 establish by clear and convincing evidence that no  
20 reasonable fact finder would have found the movant guilty  
of the offense; or
- (2) a new rule of constitutional law, made retroactive to  
cases on collateral review by the Supreme Court, that was  
previously unavailable.

21 28 U.S.C. § 2255(h); see also Rules Governing Section 2255 Proceedings  
22 in the United States District Courts, Rule 9 – Second or Successive  
23 Motions ("Before presenting a second or successive motion, the moving  
24 party must obtain an order from the appropriate court of appeals  
25 authorizing the district court to consider the motion . . . .").  
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1        In some rare cases, a literal interpretation of "second or  
2 successive" will prevent meaningful federal review. The U.S. Supreme  
3 Court has stated that it is "hesitant to construe a statute, implemented  
4 to further the principles of comity, finality, and federalism, in a  
5 manner that would require unripe (and, often, factually unsupported)  
6 claims to be raised as a mere formality, to the benefit of no party."  
7 *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007). In *Panetti*, the Supreme  
8 Court laid out three reasons for carving out limited exceptions to the  
9 general requirement that certification be obtained from a court of  
10 appeals prior to district court adjudication: (1) the implications of  
11 adopting a literal interpretation of "second or successive" for habeas  
12 practice, (2) the purposes of the Antiterrorism and Effective Death  
13 Penalty Act of 1996, and (3) the prior habeas corpus decisions,  
14 including the application of the abuse-of-the-writ doctrine. *See Panetti*  
15 *v. Quarterman*, 551 U.S. 930, 945 (2007).

16        Case law from the Court of Appeals for the Ninth Circuit shows  
17 that under the abuse-of-the-writ doctrine, a district court may consider  
18 an otherwise "second or successive" § 2255 motion if the defendant is  
19 able to show (1) an "external impediment" prevented him from raising  
20 the claim in compliance with § 2255 timing requirements, and (2) "actual  
21 prejudice resulting from the errors of which he complains." *See United*  
22 *States v. Lopez*, 577 F.3d 1053, 1060 (9th Cir. 2009). Alternatively,  
23 a district court should entertain a successive motion if the defendant  
24 shows that "a fundamental miscarriage of justice would result from a  
25 failure to entertain the claim." *Id.* (quoting *McCleskey v. Zant*, 499  
26 U.S. 467, 495 (1991)).

1 Here, Mr. Aguierre-Ganceda arguably has demonstrated that an  
2 external impediment prevented him from raising his claim relating to  
3 the redesignation of his prior felony conviction. He could not bring  
4 that claim before his prior conviction had been vacated. Nonetheless,  
5 Mr. Aguierre-Ganceda has failed to demonstrate the requisite prejudice.  
6 Even with only three qualifying prior drug convictions, Mr. Aguierre-  
7 Ganceda would still face a mandatory sentence of life imprisonment. See  
8 21 U.S.C. § 841(b)(1)(A)(viii) (mandating term of life imprisonment  
9 without release if defendant has two or more prior felony convictions  
10 for drug offenses). For the same reason, failing to address Mr.  
11 Aguierre-Ganceda's claims will not result in a miscarriage of justice.  
12 As such, the Court must deny Mr. Aguierre-Ganceda's § 2255 motion due  
13 to his failure to obtain certification from the Ninth Circuit Court of  
14 Appeals under § 2255(h). See *Lopez*, 577 F.3d at 1060 ("If petitioner  
15 failed to establish cause and prejudice or satisfy the miscarriage-of-  
16 justice exception, the court had to dismiss the petition as an abuse of  
17 the writ.").

18 Accordingly, **IT IS HEREBY ORDERED:**

- 19 **1.** Mr. Aguierre-Ganceda's Motion for Appointment of Counsel,  
20 **ECF No. 243**, is **DENIED WITH LEAVE TO RENEW**. Mr. Aguierre-  
21 Ganceda may renew his request for appointed counsel if the  
22 Court of Appeals for the Ninth Circuit authorizes a  
23 successive § 2255 motion.
- 24 **2.** Mr. Aguierre-Ganceda's successive § 2255 motion, **ECF No. 244**,  
25 is **DENIED**.

1       **3.**     If Mr. Aguierre-Ganceda wishes to proceed with a successive  
2             § 2255 motion, he should fill out an Application for Leave  
3             to File Second or Successive Petition Under 28 U.S.C. 2255  
4             (Form 12) and send it to the U.S. Court of Appeals for the  
5             Ninth Circuit. The Clerk's Office is directed to **ATTACH** a  
6             copy of Ninth Circuit Form 12 to this Order.

7       **4.**     The Clerk's Office is directed to **CLOSE** this file and the  
8             related civil file, 4:17-CV-05092-EFS.

9       **5.** The Court **DECLINES** to issue a certificate of appealability. See  
10            28 U.S.C. § 2253(c)(2).

11       **IT IS SO ORDERED.** The Clerk's Office is directed to enter this  
12     Order and provide a copy to Mr. Aguierre-Ganceda and the United States  
13     Attorney's Office for the Eastern District of Washington.

14       **DATED** this 23<sup>rd</sup> day of August 2017.

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16                                       s/Edward F. Shea            
17                             EDWARD F. SHEA  
18                             Senior United States District Judge  
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